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IN THE

Supreme Court of the United States

October Term, 1965

No. 967

PUROLATOR PRODUCTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	9
Conclusion	22
Appendix A—Statute	1a
B—Opinion below	2a
C—Judgment order below	23a
D—Final decree below	24a

CITATIONS

Cases:

Automatic Canteen Company v. *FTC*, 346 U. S. 61 (1953)	13, 16
Board v. *Hearst Publications*, 322 U. S. 111 (1944)	16
Donnelly Garment Co. v. *NLRB*, 123 F. 2d 215 (8th Cir. 1941)	14, 15
FTC v. *Anheuser-Busch*, 363 U. S. 536 (1960)	16
FTC v. *Henry Broch & Co.*, 363 U. S. 166 (1960)	20, 21
FTC v. *Motion Picture Advertising Service Co. Inc.*, 344 U. S. 392 (1953)	16
FTC v. *Sun Oil Co.*, 371 U. S. 505 (1963)	13

PAGE

Gray v. *Powell*, 314 U. S. 402 (1941) 16

Thomasville Chair Company v. *FTC*, 306 F. 2d 541 (5th Cir. 1962) 20, 21

United States v. *Drum*, 368 U. S. 370 (1962) 16

Universal Camera Corp. v. *NLRB*, 340 U. S. 474 (1951) 15

Wheeler v. *NLRB*, 314 F. 2d 260 (D.C. Cir. 1963) 14

Whitaker Cable Corporation, 51 F.T.C. 958 (1955) 8, 9

Statutes:

Administrative Procedure Act, 5 U.S.C. §1006(c) (1950) 14

Section 2(a) of the Clayton Act, as amended, 15 U.S.C. §13(a) 2, 3, 4, 7, 13, 14, 15, 16, 17, 19, 20, 21

Section 11(c) and (d) of the Clayton Act, 15 U.S.C. §21(c) and (d) 4

Federal Trade Commission Act 16

Sherman Act 2, 13

Miscellaneous:

Fifth Amendment to the Federal Constitution 3, 14

FTC Brief, *FTC* v. *The Borden Company*, Docket No. 106 (October Term, 1965) 17

Edwards, *The Price Discrimination Law*, 316-317 (Brookings Institution 1959) 10, 11

Hearings before the House Committee on the Judiciary, 74th Cong. 1st Sess. ser. 10, pt. 1, 211, 229-30 (1935) 17, 18

H.R. Rep. 2287, 74th Cong. 2d Sess., 9 (1936) 19

PAGE

Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* CCH 1961 Antitrust Law Symposium, 30 11-12

Patman, *Complete Guide to the Robinson-Patman Act,* 55 (Prentice-Hall Inc., 1963) 11

Patman, *The Robinson Patman Act,* 301 (1938) 19

Petition for Certiorari, *Monroe Auto Equipment Company* v. *FTC,* Docket No. 565 (October Term, 1965) 3

Report of the Attorney General's National Committee to Study the Antitrust Laws, 207 (1955) 11

Rowe, *Price Discrimination under the Robinson-Patman Act,* 188 (Little, Brown and Company, 1962) 11

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Purolator Products, Inc. ("Purolator"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on October 22, 1965.

Opinions Below

The initial decision of the Federal Trade Commission's ("FTC") hearing examiner is unreported and appears in the Joint Appendix at R. 22-37.[1] The opinion of FTC

1. References to R. shall mean the stated page in the Joint Appendix, nine copies of which have been filed by Purolator for this Court's use. References to CX shall mean FTC's Exhibits and references to RX shall mean Respondent's (Purolator's) Exhibits printed in the Joint Appendix.

together with Commissioner Elman's dissenting opinion, is unofficially reported in CCH 1963-1965 Trade Reg. Rep. Transfer Binder Para. 16,877 and also appears at R. 39-77. The opinion of the court of appeals, printed in Appendix B hereto, *infra*, p. 2a *et seq.*, is unofficially reported in 1965 Trade Cases 71,576 (7th Cir. 1965).

Jurisdiction

The judgment of the court of appeals (Appendix C, *infra* (printed) pp. 23a-24a) was entered on October 22, 1965 and the final decree enforcing the order to cease and desist was filed in the court of appeals on November 15, 1965 (Appendix D, *infra* (printed) pp. 25a-26a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a seller who makes a payment to a customer for performing a specified distributive function may defend a charge under §2(a)[2] that he has unlawfully discriminated in price against a customer not performing that function (and not receiving the payment) by showing that competition could not be injured because the payment was more than consumed in the cost of performing the function, leaving nothing with which to injure competition.

2. Whether FTC's mechanical formula approach to the admission and evaluation of evidence relating to competitive injury has had the effect of eliminating the competitive injury requirement of §2(a) and converting it into a price control statute contrary to the Sherman Act's philosophy of price competition and price freedom.

2. §2(a) of the Clayton Act, as amended, 15 U.S.C. §13(a), sometimes referred to as "§2(a)".

3. Whether the fair hearing requirement of the due process clause of the Fifth Amendment to the Federal Constitution was violated when FTC's evidence of customers' costs was accepted as relevant to prove competitive injury under §2(a) but Purolator's evidence of customers' costs was rejected as irrelevant to *dis*prove such competitive injury.

4. Whether a reviewing court may substitute its judgment for FTC's in a matter of pure law as distinguished from a mixed question of law and fact.

5. Whether there is any legal basis in §2(a) or its legislative history for FTC's interpretation that one who purchases not from the seller but from a customer of the seller can be deemed an "indirect" purchaser from such seller.[3]

6. Whether a seller under §2(a) may cost justify a price difference between his own (direct) purchasers and so-called "indirect" purchasers on the basis of the cost he incurred in paying his own (direct) purchasers for acting as his intermediaries or agents in distributing his product to the indirect purchasers.

Statute Involved

The statutory provision involved is §2(a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936); 15 U.S.C. §13(a). It is printed in Appendix A, *infra*, p. 1a.

3. Purolator directs this Court's attention to the second question presented for review in Monroe Auto Equipment Company's Petition for Certiorari, *Monroe Auto Equipment Company* v. *FTC*, Docket No. 565 (October Term, 1965). Since a determination of this question No. 2 assumes the validity of FTC's indirect purchaser interpretation of §2(a), Purolator respectfully asks this Court to note that Purolator is challenging the validity of this interpretation.

Statement

This petition seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed an order of FTC directing Purolator to cease and desist from violating §2(a).

Proceedings Below

On March 29, 1960, FTC issued its complaint charging Purolator with alleged price discriminations in violation of §2(a)(R. 1-6). Purolator filed an answer (R. 7-9) and an amended answer (R. 20-21) denying such allegations. FTC called no witnesses. Its case-in-chief consisted entirely of a stipulation of what hypothetical witnesses would testify plus certain exhibits (R. 95-128, 824-938). Purolator's case consisted of many witnesses and exhibits. FTC's hearing examiner issued his initial decision against Purolator on November 27, 1962. Purolator appealed to FTC. A majority of 2 (out of 3 Commissioners) held against Purolator on all issues. Their opinion was entered on April 3, 1964 together with the dissenting opinion of Commissioner Elman (R. 39-77). Pursuant to §11(c) and (d) of the Clayton Act, 15 U.S.C. §21(c) and (d), Purolator on June 26, 1964 petitioned the Court of Appeals for the Seventh Circuit to review FTC's order (R. 77-93) and on October 22, 1965 the court of appeals affirmed such order (Appendix B, pp. 2a-22a).

Background Facts

Purolator manufactures automotive replacement filters for filtering oil, air and gasoline in automobiles, trucks and buses ("Filters") and sells them nationwide to independent warehouse distributors ("WDs") (R. 100). Such WDs resell mostly to jobbers but sometimes also to fleets and to dealers (garages, service stations, etc.). Jobbers

resell mostly to dealers and sometimes to fleets. Dealers resell to the consumer (auto owner). Purolator does not itself sell to jobbers, fleets, dealers or consumers, but only to WDs (R. 100).

Some WDs are affiliated with (i.e., own or control or are owned or controlled by) some or all of the jobbers[4] to whom they sell (R. 103; also see, e.g., R. 364-365). Most WDs with jobber affiliates internally redistribute or "double handle"[5] Filters from the WD's warehouse through the affiliated jobber's warehouse (R. 494, 520, 573, 715), although some do not, and in such cases the affiliated jobbers buy directly from Purolator (R. 358-359, 413, 594). Affiliated jobbers sell mainly to dealers, but sometimes also sell to other (independent) jobbers (e.g., R. 697).

Price Structure

Purolator's price structure is adequately described both textually and graphically in the court of appeals' opinion at Appendix B, pp. 5a-7a. For purposes of this petition the following are relevant:

1. Like automotive parts manufacturers generally, Purolator's price structure was based on a suggested list price to the consumer (auto owner). Its base discounts to WDs prior to February 1, 1958 were 60% and 9% off

4. FTC counsel made much of the fact that affiliated jobbers are referred to in the stipulation of FTC's case-in-chief as "branches" or "branch locations". Regardless of terminology, however, they performed generally the functions of a jobber.

5. The term "double handling" means essentially that two physically separate but affiliated warehouses, i.e., the WD's central warehouse and the warehouse of the affiliated jobber, handle goods successively. "Internal redistribution" means distribution between such two affiliated warehouses and is used interchangeably with "double handling" (R. 107). "External redistribution" means distribution by a WD to an unaffiliated (independent) jobber (R. 105).

the consumer list, making a base price to the WD of 36.4¢,[6] and Purolator gave an additional 11% (4.4¢) external redistribution discount as compensation to the WD for redistributing to jobbers (R. 103, 104, 126, 851). These discounts were the same as Fram Corporation's ("Fram") and substantially the same as AC Spark Plug Division's ("AC") of General Motors Corporation, Purolator's major competitors (R. 140). On February 1, 1958, Purolator ceased to be a price follower and broke with this traditional price structure (R. 139-140). It raised its price to WDs by lowering its base discount to 60% and 5%, making its base price to the WD 38¢; increased its compensation for redistribution to independent jobbers by making its external redistribution discount 15% (6¢); and created a new discount of 4%[7] (1.6¢) for internally redistributing to affiliated jobbers (R. 103-104, 107). Neither AC nor Fram followed. Purolator's pricing innovation—the 4% internal redistribution discount—was attacked and held unlawfully discriminatory by FTC because WDs (without affiliated jobbers) reselling to dealers received only the basic discounts of 60% and 5%, making Purolator's price to them 38¢ (R. 103) while WDs who internally redistributed to affiliated jobbers, who in turn resold to dealers, received in addition, the 4% (1.6¢) internal redistribution discount, making Purolator's price to them 36.4¢ (A. 107).

2. Purolator suggested that WDs resell to their jobber customers at 60% off the suggested consumer list price, making a suggested resale price to jobbers of 40¢ (R. 103).

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6. Based upon a Filter with a hypothetical suggested consumer list price of $1.00.

7. The 60% was deducted from the ($1.00) suggested consumer list price. All other discounts were deducted from the (40¢) remainder.

Therefore, there was a price difference between WDs and jobbers of 5% (2¢) when WDs resold directly to dealers or 5% plus 4% (3.6¢) when WDs double handled through an affiliated jobber which resold to dealers. These differences were held illegally discriminatory on the ground that the jobbers were "indirect" purchasers from Purolator.

3. The court of appeals approved FTC's holding that WDs were Purolator's intermediaries or agents and that jobbers were Purolator's indirect purchasers. However, it rejected Purolator's defense that since it had to pay as compensation 15% (6¢)[8] more to sell and deliver to its indirect jobber purchasers through such WD-intermediaries than when it sold and delivered to WD purchasers (for resale to dealers), the price differences described in paragraph 2 above were justified under the cost proviso of §2(a) which reads:

> "Provided, that nothing herein contained shall prevent differences in the cost of * * *, sale, or delivery resulting from the *differing methods* * * * in which such commodities are to such purchasers *sold or delivered* * * *." (Emphasis added.)

Competitive Injury

FTC's evidence of the requisite competitive injury (as pertinent to this petition) consisted entirely of a subparagraph [designated "E(5)"] of its stipulated case-in-chief to the effect that witnesses, if called, would testify that there was competition between WDs and jobbers reselling to dealers, and between WDs who double handled and WDs who did not double handle (R. 101-102), in the resale of Filters and that

> "(5) Automotive parts wholesaling, whether at the warehouse distributor or jobber level, or

8. The external redistribution payment was made by Purolator to WDs expressly for performing the function of selling and delivering to jobbers.

> across such levels (i.e., where the warehouse distributor competes with the jobber for sales to dealers and fleets), is a keenly competitive business. It is also a business of relatively high costs, at all levels just mentioned. As a direct result of such high operating costs, net profit margins typical of the business range between 3% and 4% (after taxes, which are generally considered a cost of doing business). With such net profit margins, both the warehouse distributor's and jobber's profitability is extremely sensitive to the cost of product acquisition. Consequently, the 2% cash discount, which is offered by respondent [Purolator] and most other suppliers of automotive replacement parts is uniformly taken, whenever possible and is considered by warehouse distributors and jobbers alike to be important, and sometimes essential, to a profitable business." (R. 123-124.)

From E(5) FTC automatically concluded that since Purolator's 4% internal redistribution discount was mathematically greater than the 2% cash discount, it would have the requisite probability of competitive injury. On this evidence, *and on this evidence alone,* the FTC majority and the court of appeals based their condemnation of Purolator's 4%.

Purolator contended, on the other hand, that a discount is important to profitability of a WD's business only to the extent that it represents a *net* "saving or advantage"[9] and that the net saving or advantage is not the gross amount of the discount but the *net* amount after deducting the WD's cost of obtaining it.

Purolator's evidence to disprove competitive injury showed that the cost to a WD for double handling Filters from his main warehouse to the physically separate affili-

9. *Whitaker Cable Corporation,* 51 F.T.C. 958, 965 (1955).

ated jobber warehouse exceeded 4% in all cases and that the 4% discount, accordingly, provided no saving or advantage to the WD receiving it. Thus, he received nothing which would increase his margin of profit or permit him to extend additional services to customers, use additional salesmen, carry larger or more varied stocks or establish additional branch houses.[10]

Purolator showed that the 4% discount was openly offered to all WD purchasers; that a WD did not have to purchase any particular quantity or volume of Filters to qualify; that the discount was not designed for, or received by, just large WDs but by medium and small sized ones as well, and that neither large, medium nor small nonaffiliated WDs experienced (nor could they conceivably experience) any difficulty in competing with WD-recipients of the 4%. The court of appeals in upholding FTC, however, rejected as irrelevant all of Purolator's evidence to disprove competitive injury.

Reasons For Granting The Writ

1. In Deciding That Buyers' Costs Are Irrelevant To The §2(a) Issue Of Competitive Injury, The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no court case other than this proceeding, and no decision by this Court, which squarely raises the important question whether evidence of buyers' cost of performing a distributive function can be used to rebut an alleged prima facie showing of com-

10. These uses of a *net* saving or advantage flowing from a discriminatory discount have been held to be factors which typically cause such discount to have the requisite tendency to injure competition. *Whitaker Cable Corporation*, 51 F.T.C. 958 at 965 (1955).

petitive injury flowing from a discount granted for performing that function. However, Professor Corwin Edwards, former chief economist of the Federal Trade Commission, thought such evidence relevant when he said:

> "It is interesting to note that differences in the costs incurred by different classes of buyers were not considered in any of the [FTC] cases. Such differences could not have been used in direct justification of price differences, since the law makes the cost defense available only where the price concession is justified by an appropriate difference in the seller's cost. *However, where functional discounts were based on differences in the activities or services performed by buyers, the effect of these differences on buyers' costs appears to be directly relevant to the question whether or not the discounts were injurious.* In the Standard Oil case, for example, it is obvious that the four concerns receiving the jobbers' discount performed functions, such as the bulk storage of gasoline, that were not performed by the ordinary filling-station operator. If these additional functions had cost the big buyers as much as 1.5 cents per gallon, the discount granted by Standard would have had no effect in reducing the net cost of the gasoline sold at retail by the large buyers. An extra 1.5 cents in the price paid by some customers would have been equivalent to an extra 1.5 cents in the cost incurred by other customers. *Thus, a full exploration of the likelihood of injury through price difference appears to necessitate a consideration of the question of the cost differences among customers that are systematically related to the price difference.* Though such costs are not explicitly covered by the Commission's findings, what is said as to injury appears to rest on a presumption that the extra services performed by favored

> classes of distributors required no substantial extra expenditures. Apparently, this presumption was not vigorously challenged in any of the functional discount cases that were tried."[11] (Emphasis added.)

Frederick M. Rowe, one of the leading authorities on the Robinson-Patman Act, is of the opinion that buyers' costs are relevant to the question of competitive injury:

> "The statutory requirement that any competitive injury must be the 'effect of' the challenged price differential *should* absolve a price quotation of adverse competitive effects to the extent the nominal differential in favor of one buyer or customer class is neutralized by the added costs or functions assumed by the 'favored' customer as a concomitant of receiving the lower price."[12]

In a paper delivered to the Antitrust Law Section of the New York State Bar Association in January 1961, the then Chairman of FTC, Earl W. Kintner, in discussing important complaints issued by FTC in 1960, said:

> "A number of other significant 2(a) complaints were issued in calendar 1960. Among these were Purolator Products, Inc. (D. 7850). This case may produce significant future refinements of the law dealing with the right of a respondent to base a defense of a 2(a) charge on evidence of its buyer's costs. Although prior cases have made it reasonably clear that the buyer's costs cannot be used to

11. Edwards, *The Price Discrimination Law,* 316-317 (Brookings Institution, 1959).

12. Rowe, *Price Discrimination under the Robinson-Patman Act,* 188 (Little, Brown and Company, 1962). See also, Patman, *Complete Guide to the Robinson-Patman Act,* 55 (Prentice-Hall Inc., 1963) and *Report of the Attorney General's National Committee to Study the Antitrust Laws,* 207 (1955).

> form a cost justification defense, *this case poses the question whether the buyer's costs can be used to show a lack of competitive injury.*" (Emphasis added.)[13]

FTC, however, (with Mr. Kintner no longer a member), elected not to inquire into this matter, but to presume irrebuttably that any discount which is mathematically greater than the cash discount *will* have the requisite probability of adverse competitive effects regardless of the functional costs incurred by the buyer in qualifying for the discount and notwithstanding that the discount will be dissipated by such costs. The court of appeals below has upheld FTC's sweeping rejection of buyers' costs as a defense.

As already indicated, Purolator's 4% discount was not confined to large WDs but was indiscriminate in its availability even to the "Mom and Pop" WD with one small warehouse and one even smaller affiliated jobber (e.g., R. 517-518, 888). The discount had neither the purpose nor effect of providing benefits to bigness as such, and as FTC Commissioner Elman said in his dissenting opinion (R. 77):

> "• • • where, as in this case, differences in price exist as part of a complex and delicately-poised pricing system which is the result of normal competitive forces and *not of simple discrimination coerced by powerful buyers,* the Commission should avoid automatic assumptions of competitive injury • • •." (Emphasis added.)

13. Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* CCH 1961 Antitrust Law Symposium, 30.

2. The Court Of Appeals' Opinion With Respect To The §2(a) Competitive Injury Issue Is Inconsistent With Principles Laid Down By This Court With Respect To The Reconciliation Of The Conflicting Policies Of The Sherman And Robinson-Patman Acts.

By sanctioning FTC's "mechanical formula" approach to competitive injury, i.e., its automatic and irrebuttable presumption that any discount in excess of the cash discount will have the requisite competitive effect even though the discount does not constitute a net saving or advantage because dissipated by the cost of performing the distributive function for which granted, the court has decided a federal question in conflict with principles laid down by this Court in *Automatic Canteen Company* v. *FTC,* 346 U. S. 61 (1953) and *FTC* v. *Sun Oil Co.,* 371 U. S. 505 (1963).

FTC's and the court of appeals' extreme interpretation has converted §2(a) into a price control law contrary to its manifest purpose and has made it inconsistent with this Court's opinion in *Automatic Canteen* to the effect that the Robinson-Patman Act must be construed in the light of the Sherman Act's overriding policy against unreasonable restraints on price competition 346 U. S. at 74.

Furthermore, in *Sun Oil* this Court said:

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."

FTC's "mechanical formula" approach to competitive injury effectively forestalls functional pricing innovations

such as Purolator's 4% internal redistribution discount and restricts functional pricing patterns to those approved by FTC. Such "push button" enforcement is an abdication of FTC's so-called expertise and of its duty to examine into economic realities.

3. The Fair Hearing Requirement Of The Due Process Clause Of The Fifth Amendment To The Federal Constitution Was Violated When FTC's Evidence Of Customers' Costs Was Held Relevant To Prove Competitive Injury Under §2(a) But Purolator's Evidence of Customers' Costs Was Held Irrelevant To Disprove Such Competitive Injury.

FTC and the court of appeals held that evidence of industry-wide cost averages, indicating that wholesalers of automotive parts allegedly operated on small profit margins in a highly competitive industry, was relevant to show that Purolator's 4% discount could injure competition. However, FTC and the court held irrelevant Purolator's evidence of individual customer costs showing that the 4% discount was more than consumed in the costs of performing the distributive function for which it was paid. This, Purolator respectfully submits, violated the fair hearing requirement of the due process clause of the Fifth Amendment to the Constitution of the United States.[14]

In *Donnelly Garment Co.* v. *NLRB,* 123 F. 2d 215, 222, 224 (8th Cir. 1941)[15], an NLRB trial examiner accepted testimony of Board witnesses tending to prove that an employer interfered with or supported the organization of an independent union and rejected testimony offered by

14. See also Administrative Procedure Act, 5 U.S.C. §1006(c) (1950).

15. See also *Wheeler* v. *NLRB,* 314 F. 2d 260, 263 (D. C. Cir. 1963).

the employer tending to disprove such domination and support. The Eighth Circuit held that since the Board's evidence was relevant to a material issue in the case, the employer's evidence bearing on the same issue was equally relevant, saying:

> "That a refusal by an administration agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate." 123 F. 2d at 224. See also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 487-488 (1951).

Evidence of customers' costs is either relevant or irrelevant under §2 (a) to the issue of competitive injury. If relevant for FTC, it is relevant for Purolator. If irrelevant for Purolator, it is irrelevant for FTC.

4. The Court Of Appeals By Refusing To Reverse FTC's Indirect Purchaser Theory Has Misapplied This Court's Decisions And Has Added To The Confusion Of The Legal Profession As To What Matters Are Proper For Court Review.

Purolator asked the court of appeals to decide whether there is any legal basis for FTC's indirect purchaser interpretation of §2(a). In answering this question, the court did not have to determine the *application* of §2(a), *i.e.*, to decide a mixed question of law and fact. In presenting the question, Purolator in effect asked the court to assume *arguendo* that all factors which FTC had ever considered pertinent to a holding of indirect purchaser were present. Therefore, the question was one that had to be decided

solely by reference to legislative history and other methods of statutory interpretation.

However, the court of appeals in answering the question, erroneously assumed that it was a mixed question of law and fact and cited three opinions of this Court [16] which relate to the proper scope of court review of mixed questions. The *Hearst, Gray,* and *Drum* decisions hold that when mixed questions of law and fact arise, this Court will accept an administrative agency's application of a statute if the application has a "'warrant in the record' and a reasonable basis in the law." 322 U. S. at 131.

In matters of pure law, however, this Court has held that courts reviewing administrative agency decisions may substitute the court's judgment for the administrative agency's judgment. See *Automatic Canteen Co. v. FTC,* 346 U. S. 61, 74 (1953); *FTC* v. *Anheuser-Busch,* 363 U. S. 536 (1960) and *NLRB* v. *Insurance Agents' International Union, AFL-CIO,* 361 U. S. 477, 488 (1960).

Justice Frankfurter in his dissent in *FTC* v. *Motion Picture Advertising Service Co. Inc.,* 344 U. S. 392, 404-405 (1953) stated that substituted judgment should be made more readily in FTC cases than, for example, in Interstate Commerce Commission cases, because FTC unlike the Interstate Commerce Commission has authority over restrictions upon "the whole domain of economic enterprises engaged in interstate commerce." 392 U. S. at 405. Although Justice Frankfurter was discussing the Federal Trade Commission Act, his statements seem equally applicable to the Robinson-Patman Act, a statute of equal breadth.

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16. *Board* v. *Hearst Publications,* 322 U. S. 111, 131 (1944); *Gray* v. *Powell,* 314 U. S. 402, 411 (1941), and *United States* v. *Drum,* 368 U. S. 370, 375-376 (1962).

A reading of §2(a) and the legislative history will permit this Court to substitute its judgment for that of the FTC as the court of appeals should have done. The importance of clarifying this issue now cannot be overstated, since the Federal bar is confused as to the proper scope of court review.

5. In Deciding That FTC's Indirect Purchaser Interpretation Of §2(a) Is Valid, The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no decision of this Court on the validity of FTC's indirect purchaser interpretation of §2(a). In fact, Purolator knows of no case in any court in which the validity of FTC's interpretation was ever challenged, briefed or argued until this proceeding.

Legislative History of §2(a) Shows No Legal Basis for FTC's Indirect Purchaser Interpretation.[17]

There is nothing in the language of §2(a) or any other section of the Act indicating that the terms "purchasers", "purchases", "sold" and "resale" have meanings different from those commonly understood in sales transactions. The adverbs "directly" or "indirectly" in §2(a), of course, modify "discriminate" not "purchasers". During the hearings of the House Judiciary Committee on the Patman Bill (H. R. 8442), the following exchange occurred between Representative Lloyd (Nebraska) and Mr. H. B. Teegarden, the drafter of the Bill:

> "Mr. Lloyd: It is a common practice in my county for large concerns to buy at wholesale and

17. It is to be observed from FTC's brief (pp. 14-16) to this Court in *FTC* v. *The Borden Company*, Docket No. 106, (October Term, 1965), that when FTC believes the legislative history relating to §2(a) will further its statutory views, it will cite such history in *extenso*. But when, as here, the legislative history is contrary to its statutory views, then it chooses to ignore the legislative history.

> maintain large stock and, at the same time, maintain a retail department. * * *
>
> "Manifestly, the price charged by that concern to the independent retailer * * * is greater than the price that it charges itself for its own retail business. How will this bill affect that situation * * *?
>
> * * * * * *
>
> "Mr. Teegarden: There would be no question of discrimination presented. * * *"
>
> "Mr. Lloyd: I wonder why."
>
> "Mr. Teegarden: *Because it is not a sale to itself. This only covers discriminations in sales. Consequently, unless there is a sale on both sides, there can be no discrimination.*" Hearings before the House Committee on the Judiciary, 74th Cong. 1st Sess. ser. 10, pt. 1, at 211 (1935). (Emphasis added.)

At another point, Mr. Lloyd mentioned a gasoline company making a book transfer of gasoline to its own service stations, and observed that "by book transaction, they avoided the *sale* contemplated in your act." Mr. Teegarden agreed, stating, "So long as we are dealing with the question of discrimination between *purchasers,* I do not believe it would be possible to deal with an evil arising from another situation." House Hearings, *supra,* at 229 (emphasis added). Mr. Lloyd then suggested, "Unless you go further and define a purchaser." But Mr. Teegarden replied (House Hearings, *supra,* at 229-30):

> "Well, that might be done. Although personally, from the standpoint of sound legislation, I should prefer to reach it by another bill, in a more direct way, rather than define purchaser for the purpose of this act to mean something that it does not mean *in ordinary parlance.*" (Emphasis added.)

The report of the House Committee on the Bill contained the following statement:

> "When retailers acting cooperatively in their purchasing activities will be classified as wholesalers or retailers will depend naturally upon whether their cooperative organization functions as a separate entity *taking title and reselling* it to its retailer members, or merely as representing them severally in their dealings direct with the selling source of supply * * *" H.R. Rep. 2287, 74th Cong. 2d Sess. at 9 (1936) [quoted in Patman, *The Robinson-Patman Act*, 301 (1938)]. (Emphasis added.)

While this statement concerned a purchaser classification clause, deleted before passage of the Act, it shows that Congress recognized that a sale could occur only if title passed from seller to purchaser.

6. The Court Of Appeals By Deciding That Compensation Paid By A Seller To His Agents For Distributing To "Indirect Customers" Cannot Be Used For Cost Justification Purposes Under §2(a), Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no decision of this Court squarely determining the applicability of the cost justification proviso of §2(a) to the cost incurred in compensating an agent for selling to an "indirect customer."

The court of appeals, like FTC, erred in rejecting the defense Purolator interposed under the cost justification proviso of §2(a). Purolator sold to its WD purchasers (when they resold to dealers) at a price of 38¢, or 36.4¢ if the WD internally redistributed. Under FTC's own

interpretation of §2(a), Purolator sold to its alleged jobber purchasers (who resold to dealers) at 40¢ by a differing method of sale and delivery, namely, through the WD *acting as an agent*. As a result of this differing method of sale and delivery to its alleged jobber purchasers, Purolator incurred a measurable cost of 6¢ more than when it sold to its WDs *as purchasers* (for resale to dealers), i.e., it paid the WDs *as agents* 6¢ (the 15% external redistribution discount) for performing the services of warehousing, promoting, selling, shipping, invoicing and collecting.[18] This cost savings of 6¢ more than offset the maximum price difference of 3.6¢. The question squarely presented to the court of appeals was whether this 6¢ compensation was a "cost" within the meaning of the cost justification proviso to §2(a).

Conflict with Principles of Broch and Thomasville Chair Decisions

The court of appeals, in effect, said that this monetary outlay was not a "cost" but merely a "price". Its holding in this regard is in conflict with the principles set forth in *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 173-174 (1960) and *Thomasville Chair Company* v. *FTC*, 306 F. 2d 541, 544-545 (5th Cir. 1962). The *Broch* case indicates that a reduction or elimination of brokerage costs might well justify a valid reduction in price by a seller to a particular buyer. Such justification would, of course, be possible only by regarding brokerage as a cost. In

18. The WD, in other words, had two different legal relationships with Purolator. On sales by Purolator to the WD for resale to dealers, the WD was a purchaser. On sales by Purolator through the WD to jobbers, however, the WD was an agent and the 6¢ was the agent's compensation.

Thomasville Chair the 5th Circuit held, in effect, that a lower price to one class of customers can be cost justified by lower salesmen's commissions paid for sales to that class.

If salesmen's and brokerage commissions are "costs" under the §2(a) proviso, the 6¢ compensation paid by Purolator to WDs as agents for selling and delivering to jobbers was equally a "cost". There is no reason why a WD who happens to be Purolator's *customer* when he resells to dealers cannot be compensated as Purolator's *agent* in selling and delivering to jobbers. FTC's decision, affirmed by the courts of appeals, that jobbers were indirect purchasers from Purolator rested inescapably on FTC's finding that the WD, although nominally taking title to the Filters and selling and delivering them to jobbers, had become, by virtue of Purolator's alleged control over him, a mere agent. As stated in the Commission's opinion (R. 59):

> "The relevant issue is whether respondent [Purolator] so limited or controlled the activity of the warehouse distributor in relation to the jobber that the jobber became respondent's customer and *the warehouse distributor became virtually respondent's agent in handling the sale.*"

Since the WD was held to be an agent in redistributing to jobbers, the money paid him for such redistribution (whether denominated a commission, brokerage, compensation, allowance or discount) was necessarily *one of Purolator's costs of selling and delivering to such jobbers.* Under *Thomasville Chair* and *Broch,* this cost should have been recognized for purposes of the cost justification proviso to §2(a).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SUMNER S. KITTELLE, Esq.,
ALLAN TRUMBULL, Esq.,
Counsel for Petitioner.

January 19, 1966

Appendix A

Section 2(a) of the Clayton Act, as Amended by the Robinson-Patman Act

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

Appendix B

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14704

PUROLATOR PRODUCTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

OCTOBER 22, 1965

Before HASTINGS, *Chief Judge,* and KNOCH and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* On petition of Purolator Products, Inc., we have for review a cease and desist order issued by Federal Trade Commission following an administrative proceeding upon a complaint charging Purolator with violating Section 2(a) of the Clayton Act, as amended.[1]

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[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved

The complaint charged that Purolator's distribution system and its prices and discounts resulted in unlawful price discrimination. The charges relate only to the sale of Purolator's automotive replacement filters. These filters are sold as replacements for worn original equipment on automobiles, trucks and other motor vehicles in what is known as the "after market" or "replacement market."

In 1957, Purolator's business in this market exceeded $5,000,000 and its present share of the market is about 32%. It is in national competition with leading members of the automotive industry and regionally with numerous other concerns.

After a full hearing, the hearing examiner found against Purolator and issued his initial decision, including an order to cease and desist. Commission adopted the order entered by the examiner, after some modification of the initial decision. Commissioner Elman did not concur and filed a separate opinion.

The parties entered into an extended stipulation of facts and exhibits incorporated therein. Commission rested its case on the stipulation. Purolator presented testimony and documentary exhibits in support of its defense. In finding a violation of the Act, Commission relied principally on the stipulated record.

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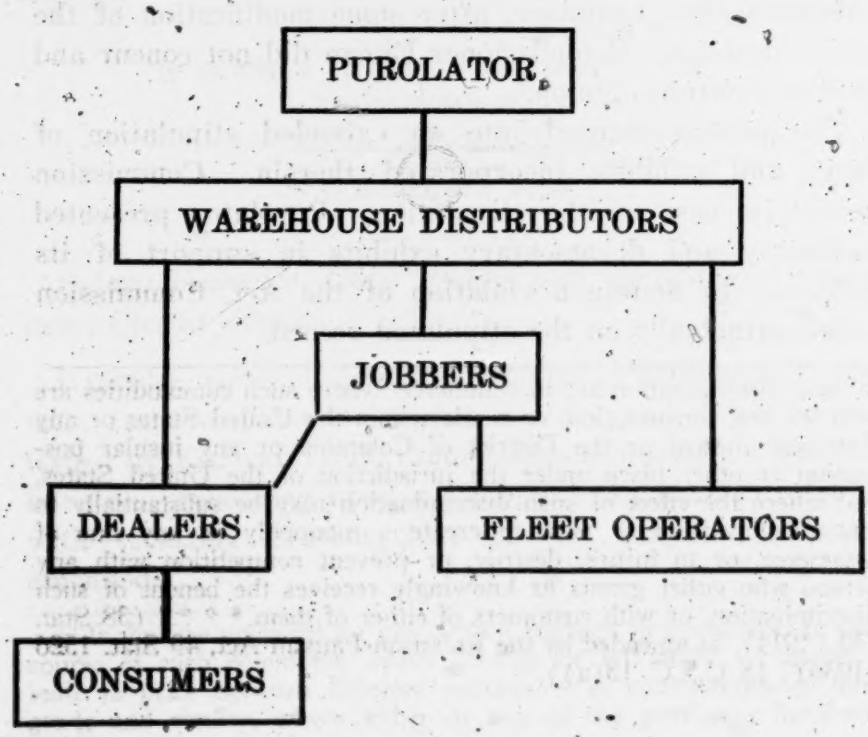
in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." (38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936); 15 U.S.C. 13(a)).

The factual background of this case is rather complicated. We find little dispute concerning the following statement.

PUROLATOR'S DISTRIBUTION SYSTEM

Purolator manufactures and sells its automotive replacement filters throughout the country. These are sold directly and only to independent warehouse distributors (WDs). WDs resell the filters to jobbers, fleet operators and to dealers (garages, service stations, etc.). Jobbers resell to dealers and fleet operators. Dealers resell to the consumer (the car owner). Fleet operators do not resell, but use the filters in their fleets (taxicabs, etc.). Purolator itself does not sell directly to jobbers, fleets, dealers or consumers. The channels of distribution may be shown as follows:



Some jobbers are affiliated with (i.e., own or control or are owned or controlled by) WDs, although they may be separate corporate entities. Most WDs with affiliated jobbers also sell to unaffiliated (independent) jobbers. Non-affiliated jobbers and independent WDs are in direct competition with WDs having affiliated jobbers.

Finally, some WDs with affiliated jobbers receive the replacement filters at a central warehouse and later reship them to their affiliates, while other WDs with affiliates have Purolator send the filters directly to their affiliated jobbers. Thus, distribution by WDs through their affiliates is in reality internal redistribution or double handling.

PUROLATOR'S PRICE STRUCTURE

The price which Purolator charges WDs for its filters depends upon the marketing channel through which the filters move to the ultimate consumer. Thus, if a WD sells to a jobber or a fleet operator, the WD receives a discount which he would not and does not receive on sales directly to dealers.

Purolator sells its automotive replacement filters to WDs according to the following discount schedule:

(1) to all WDs, a 5% discount on suggested resale prices to jobbers;

(2) to all WDs, a 15% discount on sales to unaffiliated jobbers;

(3) to WDs which distribute filters to affiliated jobbers, a discount equal to 4% of Purolator's suggested resale prices to jobbers.

On a hypothetical sales price to the ultimate consumer of $1.00, the suggested resale price to the jobber is 40¢ (or 34¢ when the jobber sells to a fleet operator). Purolator's prices to WDs, after discounts, would be as follows:

(1) to a WD without affiliated jobbers which sells to independent jobbers — 32¢ (60% – (5% + 15%));

(2) to a WD which distributes filters to affiliated jobbers who in turn sell to independent jobbers — 30.4¢ (60% – (5% + 15% + 4%));

(3) to a WD without affiliated jobbers which resells directly to dealers — 38¢ (60%–5%);

(4) to a WD which distributes filters to affiliated jobbers who in turn sell to dealers — 36.4¢ (60% – (5% + 4%)).

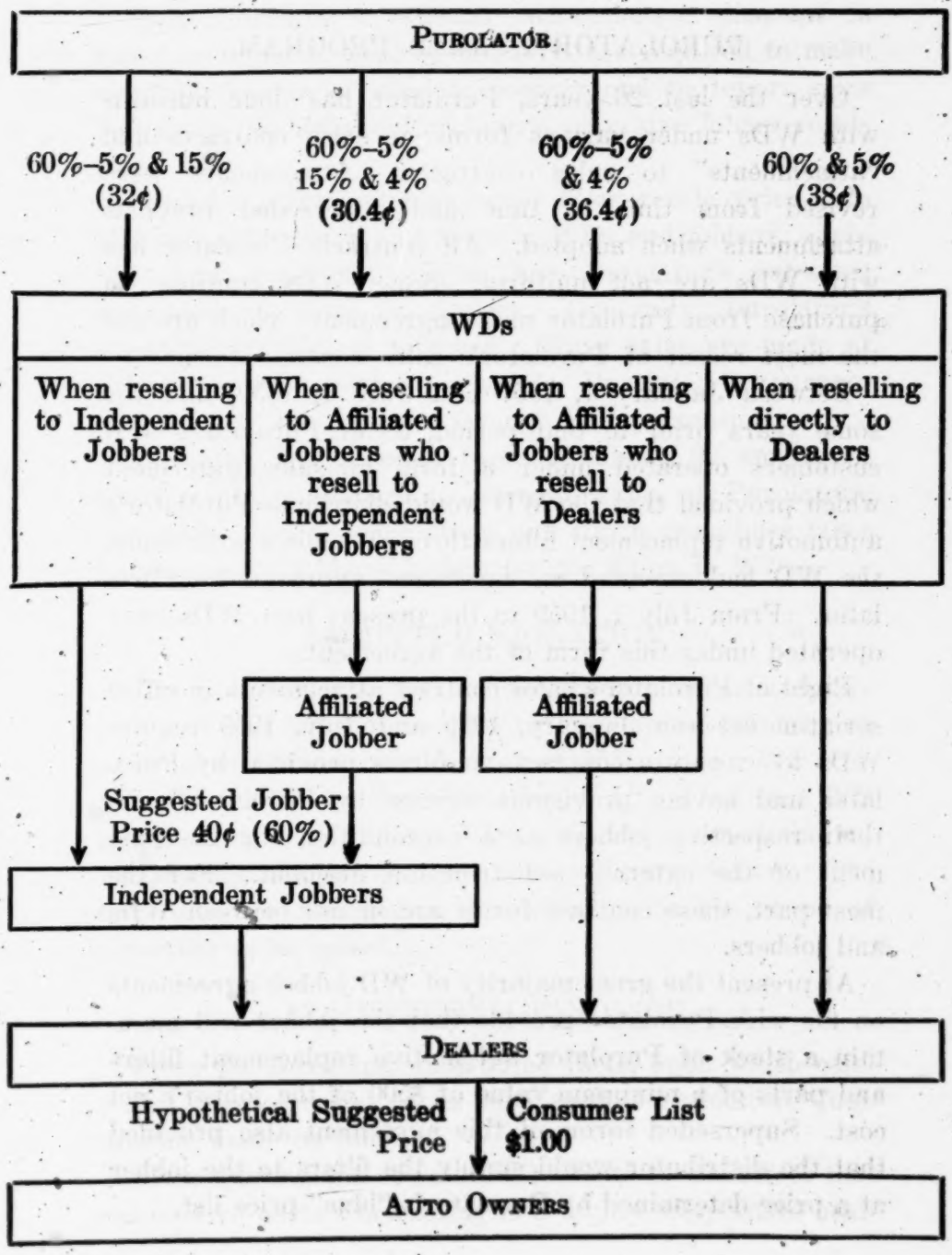
(5) to a WD without affiliated jobbers which resells to a jobber reselling to a fleet operator — 26¢ (60% – (5% + 15% + 15%)).

(6) to a WD with affiliated jobbers who resell to fleet operators — 24.4¢ (60% – (5% + 15% + 15% + 4%)).

Jobbers compete with WDs in selling to dealers and fleet operators. If jobbers can be legally considered to be purchasers from Purolator, then the following further price differences exist. In reselling filters to dealers, a jobber pays 40¢ for the filter while WDs without affiliates pay 38¢ and WDs with affiliated jobbers pay 36.4¢. In reselling filters to fleet operators, jobbers pay 34¢ while WDs without affiliated jobbers pay 32¢ and distributing WDs with affiliated jobbers pay 30.4¢.

Thus it is clear that WDs which redistribute to affiliated jobbers receive a 4% discount that WDs which do not redistribute to affiliated jobbers do not receive. This extra 4% discount is known as the internal redistribution discount. The 15% discount which all WDs receive on sales to jobbers is known as the external redistribution discount.

The foregoing pricing schedules, exclusive of fleet prices, may be more graphically portrayed as follows:


PUROLATOR
60%–5% & 15% (32¢)
60%–5% 15% & 4% (30.4¢)
60%–5% & 4% (36.4¢)
60% & 5% (38¢)
WDs
When reselling to Independent Jobbers
When reselling to Affiliated Jobbers who resell to Independent Jobbers
When reselling to Affiliated Jobbers who resell to Dealers
When reselling directly to Dealers
Affiliated Jobber
Affiliated Jobber
Suggested Jobber Price 40¢ (60%)
Independent Jobbers
DEALERS
Hypothetical Suggested Price
Consumer List $1.00
AUTO OWNERS

PUROLATOR'S SALES PROGRAM

Over the last 26 years, Purolator has done business with WDs under various forms of sales contracts and "attachments" to sales contracts. Attachments were revised from time to time and superseded previous attachments when adopted. All contracts Purolator has with WDs are not uniform. Some WDs continue to purchase from Purolator under agreements which are not the most recent of Purolator's sales contract forms.

Between January 1, 1957 and July 1, 1959, and for some years prior to that period, 58 of Purolator's WD customers operated under a form of sales agreement which provided that the WD would distribute Purolator's automotive replacement filters through jobbers with whom the WD had executed an agreement approved by Purolator. From July 1, 1959 to the present four WDs have operated under this form of the agreement.

Eight of Purolator's sales contract attachments in effect seriatim between January, 1955 and July, 1959 require WDs to execute a contract, on forms provided by Purolator and having provisions written by Purolator, with their respective jobbers as a precondition for the payment of the external redistribution discount. For the most part, these contract forms are in use between WDs and jobbers.

At present the great majority of WD-jobber agreements on file with Purolator provide that the jobber will maintain a stock of Purolator automotive replacement filters and parts of a minimum value of $500 of the jobber's net cost. Superseded forms of this agreement also provided that the distributor would supply the filters to the jobber at a price determined by Purolator's "blue" price list.

Since Purolator's external redistribution discount is based upon sales, most of the WDs are required to make monthly reports of sales to jobbers and to report sales figures on the basis of Purolator's suggested jobber resale price list.

Purolator draws up suggested filter resale price lists and generally distributes them to WDs and jobbers. Jobbers and occasionally WDs and Purolator's salesmen distribute the lists to dealers. Generally, Purolator's suggested prices are followed. When sales are made at prices below Purolator's schedule, Purolator encourages adherence to the schedule through oral persuasion.

Purolator has a sales force of about 80 employees which contacts jobbers to promote sales of Purolator's automotive replacement filters and which sometimes takes and transmits jobbers' orders for the filters to WDs.

ADMITTED VIOLATION

Purolator has admitted a price discrimination and violation of the Act with respect to Purolator's granting an external redistribution discount of 15% to one WD (referred to as "Warehouse Distributor A"), when that WD resold to dealers. Other WDs were not granted the external redistribution discount when selling to dealers. The only question concerning this violation is the scope of the order to be issued.

COMMISSION'S FINDINGS

From the foregoing undisputed facts, upon which complaint counsel relied in its case against Purolator, Commission made its findings.

After quoting the stipulation of facts to the effect that automotive parts wholesaling is a highly competitive busi-

ness having high costs and low profit margins and that wholesalers consider small percentage discounts to be important, perhaps crucial, to a profitable business, Commission found that the systematic granting of a price differential between Purolator's customers had a tendency to injure competition. In so finding, Commission rejected as not being relevant to the issue of competitive injury cost studies which Purolator offered in evidence. These cost studies, Purolator asserted, demonstrated that the 4% discount Purolator granted to WDs which redistribute to affiliated jobbers was less than the cost of redistribution those WDs bore.

Commission next found that the jobbers who purchase only from WDs were "purchasers" of Purolator within the meaning of Section 2(a) of the Act. In arriving at the conclusion that jobbers were the "purchasers" of Purolator, Commission applied the "indirect purchaser" concept to the facts of the case. That is, Commission held that Purolator exercised enough control over the terms of the sale between the WDs and jobbers that the jobbers could be considered to be purchasers of Purolator.

Commission used the following standards in arriving at its conclusion that jobbers were purchasers of Purolator:

> "Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders

by the manufacturer's salesmen even though the orders are filled by the intermediary and the manufacturer looks to the intermediary for payment, direct negotiations for changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler."

Purolator claimed that its cost of channeling its filters through a WD to a jobber and thence to a dealer was 6¢ greater than its cost of selling to a dealer through a WD. Purolator asserted that this was so because the WD which sold directly to a dealer paid Purolator 6¢ more than a WD who sold through a jobber. Commission concluded that this contention of Purolator did not satisfy the cost justification defense of Section 2(a) of the Act because Purolator was in fact attempting to use its prices rather than its costs to justify its differences in prices to WDs.

Finally, Commission found, *inter alia,* that Purolator's adoption of the 4% internal redistribution discount was not made in good faith to meet competition (a Section 2(b) defense) because the discount was not an individual response to competition and because Purolator filters were not shown to be of the same quality or to have the same public acceptance as those of Purolator's competitors.

It is well settled that Commission findings of fact are to be upheld if supported by substantial evidence. 15 U.S.C.A. §21(c); *National Macaroni Manufacturers Association* v. *F.T.C.*, 7 Cir., 345 F. 2d 421 (1965); *National Lead Company* v. *Federal Trade Commission,* 7 Cir., 227 F. 2d 825 (1955), rev'd on other grounds, 352 U.S. 419 (1957); *Fort Howard Paper Co.* v. *Federal Trade Com'n,* 7 Cir., 156 F. 2d 899 (1946), cert. denied, 329 U.S. 795 (1946).

The weight to be given to facts stipulated or proven, as well as the inferences to be drawn therefrom, are for Commission, and not the courts, to determine. *Corn Products Co.* v. *Comm'n*, 324 U.S. 726 (1945); *Trade Comm'n* v. *Staley Co.*, 324 U.S. 746 (1945); *Fed. Trade Com.* v. *Pac. Paper Assn.*, 273 U.S. 52 (1927); *National Macaroni Manufacturers Association* v. *F.T.C.*, 7 Cir., 345 F. 2d 421 (1965).

It cannot be said that Commission's conclusion that injury to competition could result from Purolator's pricing system is not supported by the evidence or that it is unreasonable since the Act requires only a showing of the possibility of injury to competition. *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956); cert. denied, 355 U.S. 941 (1958).

Purolator contends that Commission refused to allow Purolator to use customer cost evidence to disprove competitive injury while Commission itself used customer cost evidence to prove competitive injury. Purolator claims that its customer cost studies were relevant to the issue of competitive injury and that Commission, by rejecting the studies and admitting cost evidence of complaint counsel, established two rules of evidence, one favoring complaint counsel and one disfavoring Purolator.

Purolator's cost studies showed that the cost of redistribution to affiliated jobbers by WDs was in all cases greater than the 4% internal redistribution discount Purolator granted these WDs. If such is the case, Purolator argues, then the WDs receiving the 4% discount did not receive a net advantage, and, therefore, competition was not and could not be injured.

Purolator's offer to prove that the advantage to WDs with affiliated jobbers was dissipated was not an offer to prove that the WDs did not on the whole receive an

advantage from the 4% discount. Companies competing in the same line may experience different costs, and if those costs are a result of the company's method of operation, evidence that a seller helped some of its customers defray those costs while it did not help others is not relevant to disprove competitive injury. Such evidence only tends to show that some WDs have costs peculiar to their manner of doing business; it does not show nor could it show that competitors of these WDs would not be injured if some of those costs are paid by Purolator.

Commission, on the other hand, used industry-wide profit and cost averages, rather than individual customer costs for redistribution of a line, to show that wholesalers of automotive parts operated on small per unit profit margins. With such small profit margins in a highly competitive industry, an incremental price advantage per unit could be the difference between a successful or unsuccessful business in the automotive replacement filter line. Commission evidence was not the same type of evidence Purolator offered and clearly goes to the question of competitive injury. Cf. *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U. S. 941 (1958).

We conclude that Commission did not create two rules of evidence, one favoring itself and the other disfavoring Purolator. Commission merely assessed the relevancy of Purolator's proffered evidence and did so properly.

Purolator further asserts that if probable competitive injury existed, its 4% discount did not cause it, for Purolator's nonfavored WD customers were able to purchase automotive replacement filters from Purolator's competitors at lower prices than Purolator charged. Hence, Purolator claims, there is no causal nexus between the

competitive injury and Purolator's price discrimination. As authority Purolator cites *Tri-Valley Packing Association* v. *F.T.C.*, 9 Cir., 329 F. 2d 694 (1964).

In that case, the court remanded proceedings to Commission for the purpose of finding facts relating to the availability to non-favored purchasers of the same prices that respondent granted to favored purchasers for the same product in the same market. But in *Tri-Valley* the question of availability of lower prices to non-favored purchasers related to the *seller's* product, and not, as here, to similar products of competitors.

Competitive injury in the instant case could not be due to the failure of non-favored buyers to take advantage of buying the product at the same prices as the favored buyers, for the non-favored buyers could not buy Purolator's filters at the same prices. The required causal nexus for competitive injury is established by a showing that there is a demand for Purolator's filters and not just a general demand for automotive replacement filters.

The Commission's finding of probable competitive injury and Purolator's responsibility for it was supported by substantial evidence.

There are obvious price discriminations in this case since there are price differences to Purolator's different classes of competing customers. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549-51 (1960). Although price discriminations exist, the question remains whether the Act proscribes or excuses the particular discrimination.

There are in this case two general price discriminations, the price differential between jobbers and WDs and the price differential between WDs without affiliated jobbers and WDs with affiliated jobbers. These two discriminations may be treated separately.

It seems clear that if jobbers can be considered to be purchasers from Purolator within the meaning of the Act, then the fact that WDs pay Purolator less on sales to dealers and fleet operators than competing jobbers pay would amount to a price discrimination under the Act.

Purolator challenges the Commission finding that jobbers were purchasers from Purolator on the ground that the indirect purchaser concept used by Commission has no legal basis. If the indirect purchaser concept is legally sound, Purolator asserts that Commission has not shown that Purolator exercises the amount of control required to justify Commission's application of the concept.

Commission has used an indirect purchaser concept in the following cases: *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537 (1937); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943); *Elizabeth Arden, Inc., et al.*, 39 F.T.C. 288 (1944); aff'd 2 Cir., 156 F. 2d 132 (1946), cert. denied, 331 U.S. 806 (1947); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); and *General Motors Corp. et al.*, 50 F.T.C. 54 (1953).

The Second Circuit has upheld the indirect purchaser doctrine:

> "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailer and controls the terms upon which he buys." *American News Company* v. *F.T.C.*, 2 Cir., 300 F. 2d 104, 109 (1962), cert. denied, 371 U.S. 824 (1962).

To ensure fair competition among purchasers from the same seller, the Robinson-Patman Act amendments to

the Clayton Act forbade sellers to make price discriminations between purchasers except when justified by economies to the seller. If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition. *American News Company* v. *F.T.C., supra.*

While not passing upon the legality of the indirect purchaser doctrine because it was not challenged, this court in *E. Edelmann & Company* v. *Federal Trade Commission,* 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U. S. 941 (1958) affirmed, without comment upon the doctrine, a Commission decision in which the doctrine was used.

The question whether the indirect purchase doctrine of Commission has a legal basis is what is said to be a mixed question of law and fact. See e.g., 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 30. When similar questions concerning the application of statutory categories to facts have arisen, the Supreme Court has had occasion to accept an administrative agency's application of a statute if the application had a "'warrant in the record' and a reasonable basis in the law." *Board* v. *Hearst Publications,* 322 U. S. 111, 131 (1944).

"In a matter left specifically by Congress to the determination of an administrative body * * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing

* * * and an application of the statute in a just and reasoned manner." *Gray* v. *Powell*, 314 U. S. 402, 411 (1941).

In a recent case, the Supreme Court reviewed the action of a district court in the setting aside of an order of the Interstate Commerce Commission in which the Commission interpreted and applied the words "contract carrier by motor vehicle" in the Interstate Commerce Act. The Supreme Court stated:

> "The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. * * *. Because the Commission's resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedents so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission." *United States* v. *Drum*, 368 U. S. 370, 375-76 (1962).

In view of the policy underlying the amendments to the Clayton Act, the indirect purchaser doctrine of Commission appears to have a reasonable application to the facts of this case and a rational basis in law.

Purolator further asserts, however, that if Commission's indirect purchaser concept is sound, Commission nevertheless has not shown that Purolator exercises the amount of control required to apply the concept. Purolator's proffered evidence would tend to show that in fact it had made no effort to control sales to jobbers. The stipulation, on the other hand, shows that Purolator at one time had reserved to itself the legal right to control

sales and that Purolator wrote and supplied the WD-jobber agreements, as well as suggested resale price lists. The stipulation further states that Purolator solicited jobbers and urged them to maintain prices, which they for the most part did. Commission's finding is supported by substantial evidence.

In so finding, it is not necessary to pass upon the degree of seller control required to constitute a buyer once or more times removed a purchaser within the meaning of the Act; it is only necessary to conclude that Commission's finding of control was reasonable in view of the evidence, even though a court might have interpreted the evidence otherwise. We so hold.

Purolator claims that a "cost" incurred by a manufacturer in the form of a discount to a WD for redistributing to an affiliated jobber can be used as a cost-justification defense under §2(a). What Purolator terms a cost to itself is merely the difference in the prices at which it sells to WDs. The cost justification intended by the Act relates to costs "of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *." 15 U.S.C.A. §13(a).

Subsection (b) of Section 2 of the Act places the burden of rebutting a prima facie case of price discrimination by showing a justification upon the person charged with violation of the section. Although Purolator had the opportunity at the hearing before Commission of offering evidence as to its difference in costs of manufacture, sale, or delivery to different purchasers as contemplated by the Act, it failed to do so. Instead, it offered only evidence of its prices.

Purolator also claims that its 4% discount was made in good faith to meet an equally low price of a competitor,

a §2(b) defense under the Act. As with the cost justification defense, the burden of proof of the claim was upon Purolator, 15 U.S.C.A. §13(b), and the findings of Commission are to be upheld if supported by substantial evidence, 15 U.S.C.A. §21(c); *Trade Comm'n* v. *Staley Co.*, 324 U.S. 746 (1945); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 7 Cir., 241 F. 2d 37 (1957), cert. denied, 355 U.S. 941 (1958); *Whitaker Cable Corporation* v. *Federal Trade Comm'n*, 7 Cir. 239 F. 2d 253 (1956); *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U.S. 941 (1958).

The evidence which Purolator offered showed that originally Purolator granted the same total discount as its major competitors, although its discount schedule was not identical to theirs. After first raising its prices, Purolator lowered its prices to some of its WDs by 4%. Purolator states it changed its price discount schedule in the hope that WDs without jobber affiliates would concentrate on reselling to independent jobbers. These WDs would earn a 15% external redistribution discount. WDs with affiliated jobbers, however, sold to their affiliated jobbers in addition to selling to independent jobbers. On sales to their own jobbers, the WDs with affiliates were not granted a 15% discount. Purolator, in order to prevent defection to competitors of its customer-WDs with affiliates, granted a 4% internal redistribution discount to them.

WDs with affiliated jobbers, however, sell to independent jobbers. This qualifies the former for the 15% discount. As a result, in the case of a sale by WDs with affiliated jobbers to an independent jobber, Purolator goes below the prices of its competitors by 4%. Insofar as it does that, Purolator's defense of meeting competition in good faith fails, for Purolator has more than met competition.

The situation is no different when WDs sell to dealers and to fleet operators. When selling to dealers, the WD discount is 60% off the car owner price plus 5%. If the WD resells to affiliated jobbers who in turn resell to dealers, the WD receives an additional 4% discount. Purolator's evidence of the price schedules of its two major competitors revealed that their discounts in dealer sales were 60% − 9% and 60% − 10%. Thus, only those customers of Purolator which had affiliated jobbers received a price equivalent to that of one of the major competitors (60% − (5% + 4% versus 60% − 9%). WDs without affiliates which sold directly to dealers suffered a 4% disadvantage. If, as Purolator argues, it lowered its prices to meet the equally low prices of competitors, it did not lower its prices equally for all WDs which sold to dealers.

Purolator's argument that WDs reselling to affiliated jobbers do not receive the 15% external redistribution discount is not relevant here because there is no sale to a jobber. One group of WDs has been favored over another. We conclude that Purolator has not met its burden of showing that its 4% internal redistribution discount was offered to meet the equally low price of a competitor.

Purolator objects to the Commission order on the grounds that it merely paraphrases §2(a) of the statute, that it is too broad, and that it is so vague, indefinite and uncertain that Purolator cannot know what it prohibits.

Purolator was ordered to cease and desist from:

> "Discriminating, directly or indirectly, in the price of such products of like grade and quality: By selling to any direct or indirect purchaser at net prices higher than the net prices charged to any other purchaser, direct or indirect, who in fact competes with

> the purchaser paying the higher price in the resale and distribution of respondent's replacement filters."

This form of order is quite similar to that upheld by courts in other cases. See, e.g., *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Moog Industries* v. *Federal Trade Commission*, 8 Cir., 238 F. 2d 43 (1956), aff'd, 355 U.S. 411 (1958).

This court in *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1957), cert. denied, 355 U.S. 941 (1958) approved an order in all respects almost identical to the present order. It was said there at p. 156:

> "The order encompasses only the specific means by which petitioner has discriminated in the past and is broad enough to prohibit variances which would accomplish the same result. The Commission is not required to confine its order to the narrow area transgressed by petitioner, it must be permitted sufficient leeway so that its order may not be reduced to a nullity by technical, but not actual, compliance."

As to Purolator's inability to determine what is forbidden it, the Supreme Court has provided the answer:

> "If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order." *F.T.C.* v. *Colgate Palmolive Co.*, 380 U.S. 375, 394 (1965).

We hold that Commission's order is within the permissible limits afforded Commission in this case.

Finally, pursuant to 15 U.S.C.A. §21(c), Purolator has moved for leave to adduce additional evidence to be taken by Commission. By such evidence Purolator seeks to show that it does not incur costs in making direct sales which it does not incur in making indirect sales; and that its filters are the same grade and quality and enjoy substantially the same public acceptance as the filters of competitors whose competition it was allegedly meeting by its 4% discount.

We have carefully considered all propositions urged in support of the motion and Commission's objections thereto. Without further extending an opinion already much too long, it has not been shown to our satisfaction that such additional evidence is material. Further, Purolator has not established it had reasonable grounds for its failure to adduce such evidence in the prior proceeding before Commission. 15 U.S.C.A. §21(c); *F.T.C.* v. *Washington Fish & Oyster Company*, 9 Cir., 271 F. 2d 39, 43, (1959). The motion is denied.

For the foregoing reasons, the cease and desist order of the Federal Trade Commission under review in this proceeding is in all respects affirmed and will be enforced.

ORDER ENFORCED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix C

Judgment Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Friday, October 22, 1965

Before—Hon. JOHN S. HASTINGS, Chief Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

PUROLATOR PRODUCTS, INC., *Petitioner,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition to review an order of the FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Trade Commission on April 7, 1964, be and the same is hereby AFFIRMED in all respects and will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation, an appropriate decree will be entered.

Appendix D

Final Decree Enforcing Order to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PUROLATOR PRODUCTS, INC., *Petitioner,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	No. 14,704

FINAL DECREE ENFORCING ORDER TO CEASE AND DESIST

Purolator Products, Inc., a corporation, petitioner herein, having filed in this Court on July 1, 1964, a petition to review and set aside an order to cease and desist issued against it on April 3, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Purolator Products, Inc., a corporation, Docket 7850"; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on September 17, 1965, and this Court having rendered its decision and judgment on October 22, 1965, affirming and directing the enforcement of the said order to cease and desist;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, enforced, and that petitioner be, and it hereby is, commanded to obey the said order and to comply therewith.

By the Court.

JOHN S. HASTINGS
WIN G. KNOCH
LUTHER M. SWYGERT
United States Circuit Judges

Entered: Nov. 15, 1965.